Supreme Court, U.S.
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No. 01-125

IN THE

Supreme Court of the United States

JANE DOE, mother and legal guardian of
JOHN DOE, a minor,

Petitioner,

v.

AMERICA ONLINE, INC.,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Florida

BRIEF OF *AMICI CURIAE* OF ALLIANCE DEFENSE FUND AND FOCUS ON THE FAMILY IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The **Alliance Defense Fund** (ADF) is a national legal organization committed to protecting family values and defending religious freedoms. ADF provides litigation support in cases that implicate these values. ADF has long been engaged in the battle to protect children and families from the injuries caused by child pornography and obscenity. The Executive Director of ADF, Alan E. Sears, is the former Executive Director of the Attorney General's Commission on Pornography (1985). In that capacity, he oversaw and supervised the drafting of the Commission's Final Report with its recommendations that States adopt laws prohibiting the marketing and distribution of child pornography.

Focus on the Family is a California Nonprofit Religious Corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing, family relations, and the damaging nature of pornography. Dr. Dobson served as a member of the Attorney General's Commission on Pornography, convened by Attorney General Edwin Meese, III in 1985. Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the

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1. Counsel of record for the parties in this case have consented to the filing of this brief, and their letters are on file with the clerk. Pursuant to Rule 37.6, the *amici* disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Family publishes and distributes *Focus on the Family* magazine and other literature that more than two million households receive each month. Focus on the Family believes that the distribution of pornography is harmful to children and should be prohibited in all media available to children.

The amici are profoundly concerned with the victimization of children by child pornographers through the Internet. They believe that the Florida Supreme Court's misinterpretation of section 230(c)(1) of the Communication Decency Act (CDA) directly contravenes the intent of Congress in passing the statute. The amici believe that the decision below prevents the government from achieving its compelling goal of destroying the market for child pornography

Amici share the commitment to defending children and the family. Consequently, the amici support petitioner's argument that the Florida Supreme Court has misinterpreted the CDA by providing "blanket" immunity to Internet Service Providers even when knowingly distributing child pornography. The amici believe that the decision below – granting complete immunity to online service providers for knowingly marketing and distributing child pornography – is in derogation of the text and intent of the CDA.[2]

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2. Counsel for amici curiae have participated in the presentation of numerous cases in this Court involving the construction and application of federal constitutional provisions and statutes, including: *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (42 U.S.C. § 1985(3); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Free Speech Clause); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) (18 U.S.C. §§ 1961-68); *United States v. Kokinda*, 497 U.S. 720 (1990) (Free Speech Clause and 39 C.F.R. § 232.1(h)(1)).

SUMMARY OF ARGUMENT

In the decision in *Doe v. America Online*,[3] the Florida Supreme Court violated the text, intent, and legislative history of the Communications Decency Act (CDA).[4] The language of the statute plainly states that it immunizes Internet Service

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In addition, counsel for amici curiae have represented numerous groups and individuals acting as amici curiae in cases involving construction and application of federal constitutional provisions and statutes: *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment Freedom of Association); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Free Speech and Establishment Clauses); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act of 1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Free Speech Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (Establishment Clause); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (Free Speech Clause); *Natl. Interfaith Cable v. FCC*, 512 U.S. 1230 (1994) (Establishment Clause and the Cable Television Consumer Protection and Competition Act of 1992, §§ 4 and 5); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Fourteenth Amendment); *Reno v. ACLU*, 520 U.S. 1113 (1997); *Romer v. Evans*, 517 U.S. 620 (1996) (Equal Protection Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Free Speech and Establishment Clauses); *Rust v. Sullivan*, 500 U.S. 173 (1991) (42 U.S.C. §§ 300-300a-6 and 42 C.F.R. §§ 59.8-59.10); *Troxel v. Granville*, 530 U.S. 57 (2000) (Fourteenth Amendment); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Fourteenth Amendment).

3. 783 So.2d 1010 (Fla. 2001).

4. 47 U.S.C. 230.

Providers (ISP's) from "publisher," not "distributor," liability. The legislative history shows that Congress enacted the CDA to overturn the decision of the court in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[5] In *Stratton Oakmont, Inc.*, the court only imposed liability on an ISP because it had attempted to self-police the materials made available in its online services. The court specifically held Prodigy liable as a "publisher," rather than subjecting it to liability as a "distributor" of third-party information. Congress framed the CDA to protect ISPs from imposition of "publisher" liability, such as occurred in *Stratton Oakmont*, resulting from good faith efforts to police objectionable speech on their bulletin boards and in their chat rooms, even when unsuccessful. Congress did not intend to eliminate "distributor" liability. "Distributor" liability arises when ISPs have knowledge of unlawful material (such as child pornography advertisements) on their bulletin boards and chat rooms and fail to remove it.

If Congress had intended to afford ISPs protection from "distributor" liability and from "publisher" liability, it would have overturned *Cubby v. CompuServe, Inc.*,[6] in which a trial court held that CompuServe was a "distributor" of third-party information.

Moreover, the Florida Supreme Court contravened the intent of Congress in enacting the CDA. Congress undoubtedly sought to encourage ISPs to self-police the content of their sites for offensive materials such as child pornography. The court below created a disincentive for ISPs to act responsibly; it accomplished that result by construing the CDA to immunize

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5. 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).

6. 776 F. Supp. 135 (S.D.N.Y.1991).

ISPs from "distributor" liability even when made aware of child pornography on their sites but fail to remove it. Construing the CDA in that way, as the Florida Supreme Court has done, turns the statute on its head.

ARGUMENT

Doe's petition involves the construction and application of section 230 (c)(1) of the Communications Decency Act, 47 U.S.C. 230. That section grants immunity from tort liability to Internet Service Providers ("ISPs"), such as America Online, Inc. ("AOL"), in their capacity as "publisher or speaker" of any information originating with a third party user of the service. The Florida Supreme Court erroneously interpreted the statute to extend immunity for ISPs acting not only in their capacity as "publishers," but acting also in their capacity as knowing "distributors" of unlawful material.

In the facts presented on the present petition, the offending materials consisted of child pornography – videotapes of the eleven-year-old child John Doe.[7] The Florida court's misinterpretation ignores and tortures the language of the federal statue. It rewrites the CDA in derogation of the common law distinctions between information *publisher* liability on the one hand, and information *distributor* liability on the other.[8]

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7. *See Doe v. America Online, Inc., 783* So. 2d 1010,1011-12 (Fla. 2001).

8. The Florida court's erroneous statutory interpretation was largely based on an earlier decision of the Fourth Circuit, *Zeran v. America Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997)(holding that the word "publisher" in the CDA should be read to include "distributor"), a case that has been widely criticized by legal commentators. *See, e.g.*, Ian

Indeed, the Florida court's decision makes the CDA a nullity. It allows ISP's to avoid liability entirely by lumping erroneously these distinct common law tort ideas together. Here, AOL knew that Richard Lee Russell was using its "chat rooms" to market hard core pornographic pictures and videotapes of the child John Doe. Yet AOL took no action to remove it, although AOL purports to police its chat rooms to prevent posting of illegal materials in them. The Florida court's decision takes the CDA, which Congress designed to remove disincentives for ISP's to self-police chat rooms, and gives it the exact opposite effect. Absent the potential for "distributor" liability if it fails to act, an ISP has no incentive to remove objectionable material from its chat rooms and bulletin boards even when it has actual knowledge that the material is present (as happened here). This result completely defeats the purpose of the statute.

For purposes of the present petition, this Court must take the facts alleged in the complaint as uncontested.[9] In 1994,

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Ballon, *Zeran v. AOL: Why the Fourth Circuit Is Wrong*, J. Internet L., Mar. 1998, at 6; David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147 (1997); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 Santa Clara L. Rev. 905 (1999); Steven M. Cordero, *Comment, Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999).

9. Since the complaint was dismissed on its face pursuant to AOL's motion that the petitioner's claims were barred by 47 U.S.C. 230 (c)(1), the factual allegations contained in the complaint must be taken as true for purposes of the present petition. See *America Online*, 783 So. at

Richard Lee Russell, an adult, lured John Doe, then aged eleven, and two other children to have sexual relations with each other and with him. Russell photographed and videotaped these acts. He then used AOL's "chat room" to market and sell the photographs and videotapes. In 1997, Doe filed an action for damages for emotional injuries against Russell and AOL. In part, Doe alleged that AOL is liable to him as a "distributor" for knowing or having reason to know that Russell and other child pornographers used its service illegally to market and distribute child pornography. The suit alleges that actual complaints had been communicated to AOL about Russell's transmission of child pornography on AOL's "chat rooms." Although AOL reserved the right to terminate service without notice of any member, it neither warned Russell to stop nor suspended his service.[10]

The Florida Supreme Court affirmed dismissal of Doe's complaint. T he court held that section 230(c)(3) of the CDA absolutely immunizes AOL from common law tort actions concerning information it distributes on its service.[11] As discussed below this decision was demonstrably wrong.

1. "Distributors" are not "Publishers" at Common Law

An analysis of the incorrect decision below must begin with a discussion of the distinction between "publisher" liability and "distributor" liability.

It is well established that at common law a "publisher,"

1012-13.

10. *Doe,* 783 So. 2d at 1011-12.

11. *Id.* at 1018.

such as a newspaper, is a person or entity that communicates information, either intentionally or negligently, to a third party who understands the communication.[12] At common law one who repeats, prints, or otherwise publishes a defamatory statement made to another person is as liable for the statement as the original speaker.[13] A publisher that exerts editorial control over its distribution of information can be held liable for defamatory statements in its publication even if it did not know that the statement was in the publication.[14]

"Distributors" (e.g., news vendors, bookstores, and libraries), on the other hand, are held to a different standard than publishers. A distributor is one "who circulates, sells or otherwise deals in the *physical* embodiment of the published material."[15] As the *Restatement (Second) of Torts* states, in contrast to a publisher, a distributor is "one who only delivers or transmits defamatory matter published by a third person."[16]

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12. *See Restatement (Second) of Torts* sec. 577 (1977); *W. Page Keeton, et al., Prosser and Keeton on the Law of Torts* at 798 (5TH ed. 1984).

13. *See Restatement (Second),* at sec. 578. Of course, "publishers" of alleged defamation of "public figures" or involving matters of "public concern" enjoy a higher degree of protection in the law. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

14. *Prosser and Keeton*, at 810.

15. Giorgi Bovenzi, *Liabilities of System Operators on the Internet*, 11 Berkeley Tech. L.J. 93, 135 (1996); *and see Restatement (Second) of Torts*, sec. 581.

16. *Id.*

A distributor of defamatory statements cannot be held liable for defamation unless the claimant shows that the distributor knew or should have known of the defamatory nature of the statement. Unlike a "publisher," a distributor is under no duty to examine the publications to decide if any statements contained therein are tortious.[17]

Thus, if a defendant is a "publisher," a claimant is not required to prove that the defendant was aware of the content of the expression at issue.[18] If a defendant is a "distributor," however, courts do require such proof.[19]

2. *Cubby v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*

These distinct forms of liability -- publisher liability and distributor liability -- were applied to online service providers in two important New York cases involving the online transmission of alleged defamatory speech provided by third

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17. *Id.*

18. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) 1794, 1796-98 (N.Y. Sup. Ct. 1995).

19. *See id.* at 1796 (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (contrasting the liability of publishers with distributors). *See W. Page Keeton, et al., Prosser and Keeton on the Law of Torts* sec. 113, at 810-11 ("It would appear quite clearly that those who perform a secondary role in disseminating defamatory matter authored and published by others in the form of books, magazines and the like--as in the case of libraries, news vendors, distributors, and carriers--would not be subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published").

parties. A court must understand *Cubby v CompuServe, Inc.*,[20] and *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*,[21] to understand the purpose of the CDA.

In the 1991 case, *Cubby v. CompuServe, Inc.*, the plaintiff brought a libel action against CompuServe for an alleged libel posted on one of CompuServe's bulletin boards. CompuServe owned and operated the bulletin board. Nonetheless, the court held that it could not have been aware of the alleged statements and, in fact, was not aware because of the number of messages posted.[22]

The *Cubby* court held that CompuServe had no more editorial control over the publication than did a library or bookstore, and that CompuServe was essentially "the functional equivalent of a more traditional news vendor."[23] Based on this lack of control, the court held that CompuServe was a mere "distributor" and that it would not hold it liable for defamation unless Cubby could show that CompuServe knew or should have known of the defamation posted on its bulletin board.[24]

Following closely on the heels of *Cubby*, the 1995 decision in *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*, was the immediate catalyst for the enactment of the CDA. There the

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20. 776 F. Supp. 135 (S.D.N.Y.1991).

21. 23 Med L. Rptr. 1794 (N.Y.Sup. Ct. 1995).

22. 776 F. Supp. at 137.

23. *Id.* at 140.

24. *Id.* at 137-138.

court held that an online service provider, Prodigy, was liable for a defamatory statement posted on its bulletin board.[25] The court found that Prodigy exercised sufficient control over its bulletin board, thereby classifying the service provider as a "publisher."[26] Prodigy used an automatic software screening program to police activity on the bulletin board. Additionally, Prodigy used employees to monitor the content of the bulletin board to comply with certain company guidelines. By making the choice to regulate content on its bulletin boards, Prodigy exerted control over its bulletin board service. Therefore, relying on the analysis in *Cubby*, the *Stratton* court held that Prodigy was a "publisher" and not a "mere distributor" and held Prodigy liable for the defamation.[27]

In analyzing publisher liability, the *Stratton Oakmont* court squarely recognized the distinction between "publisher" and "distributor" liability. The court stated, "[a] finding that [Prodigy] is a publisher is the first hurdle for plaintiffs to overcome in the pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it."[28] In contrast, distributors such as bookstores and libraries may be liable for the statements of others only if they knew or had reason to know of the statement at issue. A distributor of the material is considered a passive conduit and will not be found liable

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25. 23 Med. L. Rptr. at 1796-97.

26. *Id.* at 1797.

27. *Id.* at 1798.

28. *Id.* at 1796.

without fault.[29]

Thus, the court in *Cubby* held that since CompuServe had not attempted to exercise content control in policing its chat rooms and electronic bulletin boards, it was *not* liable for defamation since it did not fit the common law definition of "publisher." Instead, the court held, CompuServe was a mere "distributor." In *Stratton Oakmont*, on the other hand, Prodigy had, in fact, attempted to self-police its chat rooms by restricting objectionable material. Paradoxically, the court penalized Prodigy for unsuccessfully attempting to police its service; it did this by concluding that Prodigy was liable as a "publisher." Thus *Stratton Oakmont* set up the perverse incentive for ISPs *not* to self-police their bulletin boards and chat rooms since they could be liable as *publishers* if their content restrictions were unsuccessful.

3. Congress Responds to Correct the Perverse Incentives Resulting from *Cubby* and *Stratton Oakmont* by Enacting the Communications Decency Act

Congress then entered the picture and endeavored to overturn *Stratton Oakmont* by legislatively removing the potential for *publisher* liability to encourage ISP's to self-police their services. One year after the *Stratton Oakmont* decision Congress enacted the CDA.

In relevant part the CDA states that "no provider or user of an interactive computer service shall be treated as a *publisher or speaker* of any information provided by another information content provider."[30] As the Conference Report states the

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29. *Id.*

30. *See* 47 U.S.C. 230 (c)(1)(italics added).

purpose of the CDA "is to overrule *Stratton-Oakmont v. Prodigy* and any similar decisions which have treated such providers and users as *publishers or speakers* of content that is not their own because they have restricted access to objectionable material."[31] "[T]his section provides 'Good Samaritan' protections from civil liability for providers or users to objectionable computer service for actions to restrict or to enable restriction of access to objectionable online material."[32]

Thus, by eliminating the potential for "publisher" liability, such as that found in *Stratton Oakmont*, the statute encouraged online service providers to self-police objectionable content on their bulletin boards and chat rooms without penalizing them if they are unsuccessful.[33]

4. Congress Meant "Publisher" When It Used That Term in Section 230(c)(1), and It Did Not Mean "Distributor"

The CDA did not remove *distributor* liability or seek to overturn the *Cubby* decision. To do so would have eliminated the incentive for ISPs to self police their services that Congress sought to achieve by enacting the CDA.

First, as discussed above, the publisher and distributor

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31. S. Conf. Rep. No. 104-230, 435 (1996). *And see* 141 Cong. Rec. S1953 (daily ed. Fed., 1, 1995) (the focus of the CDC is to "promote decency" on the internet).

32. *Id.*

33. *See* James F. Beresford, *Online Liability Issues: Defamation, Invasion of Privacy and Negligent Publishing*, 482 PLI/P 471, 489 (1997) ("The Conference Committee Report specifically states that ...[section 230(c)(1)] is intended to overrule *Stratton Oakmont's* holding").

terminology is not only well known in common law, the *Stratton Oakmont* court used it, and it was widely discussed by legal commentators in the time leading up to the enactment of the CDA.[34] Section 230 expressly refers to online service providers as a "publisher and speaker" of third party content; there is, in contrast, no mention of service providers as "distributors."

Second, the statement in the Conference Report that Congress intended section 230 to overrule *Stratton Oakmont* strongly indicates that Congress intended it to apply only to "publishers."[35] As the Conference Report stated, Congress sought to overrule *Stratton Oakmont*, which found Prodigy to be a "publisher" rather than a "distributor," and immunize online service providers from the imposition of strict liability as "publishers" for their efforts to self regulate, a standard that is not in any way involved with "distributor" liability.[36]

Moreover, since *Stratton Oakmont* did not impose

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34. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) at 1796; Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 Conn. L. Rev. 203, 225-28 (1989); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 Harv. J.L. & Tech. 65, 95-99 (1992); Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace*, 47 Fla. L. Rev. 247, 273-75 (1995); Robert Charles, *Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?* 2 J.L. & Tech. 121, 130-31 (1987).

35. *See* H.R. Conf. Rep. No. 194-458, at 194 (1996).

36. *See* S. Conf. Rep. No. 104-230, at 435 (1996).

"distributor" liability, it was not necessary for Congress to eliminate "distributor" liability in order to overrule the case. Indeed, immunizing ISPs from "distributor" liability, as the Florida court has done, addresses a concern not present in *Stratton Oakmont*, and would defeat the very purpose of the statute. If Congress had intended to afford ISP's immunity from "distributor" liability, it presumably would have overturned *Cubby v. CompuServe*, which of course held Prodigy liable as a "distributor."

There is no real dispute that it was Congress' intent in enacting the CDA to encourage ISP's to take steps to eliminate objectionable material through their own self-policing methods. In light of *Stratton Oakmont* it makes good sense that the CDA would not penalize unsuccessful ISP efforts to remove unlawful material from their systems. In light of this goal, the elimination of "publisher" liability is fully justified. It is quite another thing, however, for AOL and other ISP's to argue that the statute includes the elimination of "distributor" liability.

To do so would remove the incentive for ISPs to self police their chat rooms that the CDA intended to preserve. Absent the potential for *distributor* liability if it fails to act, an ISP has no legal incentive to remove objectionable material from its service even when it has actual knowledge that the material is present. Indeed, under the Florida court's reading, the CDA hardly qualifies as a "Good Samaritan" statute since to qualify for protection one need merely be a provider or user of an interactive computer service.[37] It is not an overstatement to assert that the Florida court's erroneous construction and application of the CDA will result in an increase rather than a

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37. *See* 47 U.S.C. 230(c).

decrease in the marketing and distribution of child pornography on the Internet since any legal incentive to remove it is now gone.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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